UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

CASE FARMS PROCESSING, INC.		
	CASES	**8-CA-39152**
		8-CA-39187
and		**8-CA-39257**
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 880		

ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO THE BOARD IN RESPONSE TO RESPONDENT'S EXCEPTIONS

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This matter is before the Board based upon a decision issued by Administrative Law Judge Mark Carissimi ("ALJ") on September 16, 2011. On February 24, 2011, the Regional Director for Region 8 issued an Amended Consolidated Complaint and Notice of Hearing alleging that Case Farms Processing, Inc. ("Respondent") committed numerous violations of Sections 8(a)(1) and (3) of the National Labor Relations Act. Respondent filed exceptions to the ALJ's decision on October 14, 2011. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the Acting General Counsel submits this Answering Brief in response to Respondent's exceptions and argues that the record evidence and cited case law fully support the ALJ's analysis and conclusions with regard to the exceptions taken by Respondent.[1]

I. INTRODUCTION

Respondent operates a poultry processing plant in Winesburg, Ohio where it employs approximately 475 non-supervisory employees. (Tr. 26-28). At all relevant times, Charles McDaniel has been Respondent's Vice President and General Manager and Abel Acen has been Respondent's Complex Human Resources Manager. (Tr. 25, 29)

On June 5, 2007, the United Food and Commercial Workers Union, Local No. 880 ("Union") was certified as the collective bargaining representative of production and maintenance employees at Respondent's facility. (Tr. 787) The parties have not yet achieved a first contract.

Guatemalans account for around 70% of the employees at Respondent's facility. (Tr. 59) In the summer of 2010, Respondent hired non-Guatemalan Hispanics, many of whom are originally

[1] This brief will use the following citations. The transcript of the administrative hearing will be referred to as Tr. __, Respondent's exhibits will be referred to as R. Ex. __, Acting General Counsel's exhibits will be referred to as G.C. Ex. __, the ALJ's September 16, 2011 decision shall be referred to as J.D. __, and Respondent's Brief in Support of Exceptions shall be referred to as R. Brief __.

from Cuba, from the Miami, Florida area. (Tr. 61-62) Acting General Counsel's witness Yerima Medero Ledesma was among the new Cuban hires. (Tr. 66-67) Abel Acen is Cuban. (Tr. 371)

Between around August 11 and September 10, 2010,[2] there were five strikes at Respondent's facility. (Tr. 36-37, 526) Each strike was related to the discipline, suspension or termination of employees. (Tr. 529-530) None of the Cubans or other employees who came from Florida ever engaged in strikes or other union activity, and at least some of them are outspoken anti-union activists who have circulated a decertification petition. (Tr. 77-78, 385, 953)

II. THE BOARD SHOULD DEFER TO THE CREDIBILITY DETERMINATIONS OF THE ALJ REGARDING THE ALLEGED SECTION 8(A)(1) VIOLATIONS INVOLVING ACEN AND MEDERO LEDESMA

Throughout its Brief, Respondent repeatedly argues that a de novo review of the ALJ's credibility determinations with regard to General Counsel witness Medero Ledesma is appropriate because the preponderance of the evidence suggests his conclusions were incorrect. Respondent characterizes Medero Ledesma as an unreliable witness and then argues that despite this, the ALJ "unequivocally deferred to her word over that of Acen." (R. Brief 37) What Respondent conveniently fails to recognize is that the ALJ found significant deficiencies in Acen's testimony. The ALJ noted that Acen "was at times evasive and at other times testified in a manner…designed to bolster the Respondent's defense." (J.D. 4)

The ALJ specifically pointed out that in some circumstances he credited some, but not all, of a witness's testimony. (J.D. 2, fn. 4) Moreover, Respondent's above assertion is patently false, as the ALJ found Acen's testimony more credible than Medero Ledesma's concerning several other issues. Indeed, it is not surprising that the his decision is replete with instances where he referred to other witness' testimony in support of his determination that either Acen's or Medero Ledesma's testimony was more credible with regard to a particular issue. Thus, the ALJ's credibility findings

[2] All dates hereafter refer to 2010, unless otherwise noted.

were explained at length and well reasoned. The Respondent has not demonstrated that a clear preponderance of the relevant evidence proves otherwise. The Board should defer to the ALJ's credibility findings with regard to Acen and Medero Ledesma pursuant to the standards set forth in *Standard Drywall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

III. THE ALJ CORRECTLY DETERMINED THAT ACEN HAD PRIVATE MEETINGS WITH MEDERO LEDESMA

The ALJ rightly concluded that Medero Ledesma met regularly with Acen alone in his office. In this regard, the ALJ credited the testimony of Medero Ledesma as corroborated by witness Armando Diaz, over that of Acen who testified that he never once met with Medero Ledesma alone in his office. The ALJ concluded that Medero Ledesma did meet with Acen based on Diaz's testimony that he frequently saw Medero Ledesma in Acen's office in the afternoons and also Medero Ledesma's knowledge of details about Acen's family that the ALJ found she could only have learned from having had conversations with Acen himself. (J.D. 8; Tr. 494, 1059-1063)

The ALJ also correctly found that Medero Ledesma could have entered Acen's office unnoticed by other human resources personnel, who testified that they never saw Medero Ledesma and Acen meet alone. Respondent's exception to the above conclusion of the ALJ is based on Respondent's erroneous belief that it lacks any evidentiary support.

First, Respondent argues that Medero Ledesma testified that the only path she took to and from Acen's office was the one beginning with the human resources door in front of the human resources window and ending at Acen's door. *See*, G.C. Ex. 27. However, Medero Ledesma never testified that she passed any window to reach Acen's office. (Tr. 445-446) Her testimony was merely that she took "[t]he same path." (Tr. 446) On page 31 of Respondent's Brief in Support, Respondent highlights Medero Ledesma's testimony which states, "[t]his is the door for Human Resources, and this is the door for his [Acen's] office. (Tr. 446) Respondent contends that this demonstrates that Medero Ledesma would have entered Acen's office through the door leading

from the human resources office. Again, such a path would not have taken Medero Ledesma by the window looking out onto the hallway. (G.C. Ex. 27) Furthermore, as G.C. Ex. 27 makes clear, there are two doors to Acen's office. Since Medero Ledesma did not have the benefit of referencing G.C. Ex. 27 when she testified (it was introduced later in the hearing), her testimony set forth above about Acen's door could have been referring to the door leading out to the hallway. Therefore, the ALJ correctly concluded that Medero Ledesma could have entered Acen's office through his hallway door.

Respondent next asserts that the ALJ's understanding of the layout of the Case Farms facility is incorrect, and that Medero Ledesma could not have entered Acen's office from the training room/supervisor's lunchroom where she took her breaks. Respondent's main contention in this regard is that G.C. Ex. 27 does not indicate the location of the training room/supervisor's lunchroom. However, in discussing the location of the human resources offices, Respondent's witness and human resources representative Stephanie Ajanel testified that if one were to walk down the hallway past the human resources window and then past Acen's hallway office door, it would lead to the shipping office, the plant manager's office and the training room. (GC Ex. 27; Tr 924-925) Therefore, contrary to Respondent's arguments, the ALJ correctly concluded that Medero Ledesma could have entered Acen's office from the hallway leading from the training room/supervisor's lunchroom without being noticed by any human resources personnel.

Further support for the ALJ's conclusion that Acen's meetings with Medero Ledesma could have gone undetected by other human resources personnel is found in the record. The ALJ credited Diaz's testimony that he saw Medero Ledesma in Acen's office in the afternoons. (J.D. 8; Tr. 494). Thus, it is entirely possible that Medero Ledesma's visits to Acen's office came at a time when human resources personnel were gone for the day, since those individuals left at 5:00 p.m. and Medero Ledesma worked until 6:30 p.m. (G.C. Ex. 11, Tr. 918)

As demonstrated by the record evidence, the ALJ rightly concluded that Acen had private meetings with Medero Ledesma in his office, during which time he made the statements to her as alleged in Amended Complaint paragraphs 9(A), (B), (C), (E), (G), (H) and (I).

IV. THE ALJ CORRECTLY CONCLUDED THAT ACEN MADE MEDERO LEDESMA RESPONDENT'S AGENT FOR THE PURPOSE OF MAKING UNLAWFUL STATEMENTS TO EMPLOYEES

The ALJ rightly found that Acen conferred upon Medero Ledesma actual authority to act as Respondent's agent in making unlawful statements to dissuade employees from striking in August and September 2010. (J.D. 9-10)

When Medero Ledesma first began working for Respondent, she had no experience with unions and so when the first strike occurred about two weeks into her employment, she went to talk to Acen and asked him why he permitted such disrespectful conduct. (Tr. 383) Acen explained to Medero Ledesma that he could not get rid of the strikers because there were laws that protected them, but that he would take them out "one at a time." (Tr. 383-384) Given the foregoing, the ALJ rightly found it entirely plausible that Acen requested Medero Ledesma to assist him in stopping the partial-day strikes occurring around that time, and that he directed her to make certain statements on each occasion that employees were contemplating a strike. (J.D. 9-10) As found by the ALJ, Acen instructed Medero Ledesma to tell employees that they should return to work because as long as they belonged to the Union, their salary was not going to increase. (J.D. 10; Tr. 386-387) The ALJ concluded that by directing Medero Ledesma when to make statements and what to say, Abel gave her actual authority to speak on behalf of the Respondent. (J.D. 10)

Respondent's exception to the ALJ's conclusions above is two-fold. First, Respondent reiterates its contention that the ALJ erred in finding that any private conversations ever occurred between Medero Ledesma and Acen. With no conversations having occurred, argues Respondent,

no actual authority could have been conferred by Acen. As explained above, the ALJ's conclusion that Acen and Medero Ledesma did have private conversations was well-founded.

Respondent's second argument is that the ALJ should have considered Respondent's apparent authority argument because if he had done so, he would have found that Medero Ledesma was never clothed with apparent authority to act for Respondent. It is well-settled, however, that the Board follows the common-law principles of agency when determining whether one person acts as the agent of another. *Dr. Rico Perez Products*, 353 NLRB 453 (2008). Under the common-law principles of agency, a principal can create an agent either by conferring upon a person the actual authority to take an action (actual authority), or by manifesting to a third party that the person has authority to act for the principal (apparent authority). RESTATEMENT (THIRD) OF AGENCY, §3.01 and 2.03 (2006). And as the ALJ correctly noted, the Board has specifically stated that actual and apparent agency are independent of one another, and only one needs to be present to establish an agency relationship. (J.D. 10) Therefore, the ALJ did not err when he failed to consider Respondent's apparent agency argument because he had already rightly concluded that Acen had made Medero Ledesma Respondent's actual agent.

Since Respondent, by Acen, made Medero Ledesma its agent for the purpose of making unlawful anti-Union statements to employees, it follows that Respondent further violated Section 8(a)(1) when Medero Ledesma carried out Acen's instructions in August and September, as found by the ALJ. Medero Ledesma told employees on these occasions that employees would not get a raise so long as they belonged to the Union. (Tr. 386-387) It is a well-settled violation of Section 8(a)(1) for an employer to inform employees that there will be no raise until they get rid of the union. *Southside Elec. Coop., Inc.*, 243 NLRB 390, 399 (1979).

V. THE ALJ CORRECTLY FOUND RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT WHEN ACEN AND MANAGER BERNARD COOPER MADE VARIOUS STATEMENTS TO EMPLOYEES

a. The ALJ Correctly Concluded that Acen's Statement to Medero Ledesma about Where She Could Not Live Violated Section 8(a)(1) of the Act as Alleged

When Medero Ledesma and her brother arrived in Canton, Ohio, Acen picked them up and took them to a hotel in Massillon, Ohio. (Tr. 370-371) Acen did not deny he transported Medero Ledesma and her brother from Canton to Massillon. Respondent had arranged to pay for a one-week stay for all the new employees arriving from Florida at such hotels, including Medero Ledesma and her brother. (Tr. 373)

In around August, Medero Ledesma approached Acen about her search for an apartment rental. During their conversation, Acen told Medero Ledesma that she could not live in the Dover/New Philadelphia area because employees who were Union supporters lived there and they would approach her about joining the Union, which she could not do. (Tr. 380-382) Medero Ledesma's affidavits, introduced by Respondent as R.10 and 11, are consistent with her testimony at the hearing on this point. Based on the above evidence, the ALJ concluded that Acen told Medero Ledesma not to live in Dover/New Philadelphia because the Union supporters living there would talk to her about joining the Union, which she could not do. (J.D. 8) The ALJ further found that this statement would reasonably tend to interfere with the free exercise of employee rights under the Act. (J.D. 8)

Respondent argues that since Acen's statement contained no explicit or implicit threat of reprisal, it could not have been coercive of employees' Section 7 rights. While employers are granted the right under Section 8(c) of the Act to express their views about unionization in general or a union in particular, that right is balanced against the employees' right to be free from conduct which would tend to interfere with their rights under Section 7. *Mesker Door, Inc.*, 357 NLRB No. 59 at sl. op. p. 7 (2011) Furthermore, an employer's statement must be viewed in context and not in isolation to determine any coercive effect. *Flying Foods Group, Inc.*, 345 NLRB 101, 107 (2005).

Acen's statement to Medero Ledesma that she could not live in the Dover/New Philadelphia area because Union supporters would approach her to join the Union violates Section 8(a)(1) of the Act. In *Tyson Foods, Inc.*, 311 NLRB 552 (1993) an employer-agent prevented an employee from speaking with a union steward about the union. The agent sat between the two employees and whispered to a third employee that she was trying to stop the conversation. The Board noted that the agent's actions took place in a context where two managers had told a group of supervisors that one way to support a decertification effort was to isolate union supporters from other employees. Id. The Board concluded that in such a context, the agent's interference violated the Act.

The facts in *Tyson Foods* are very similar to those in the instant case: both the agent in *Tyson Foods* and Acen were trying to prevent dissemination of information about the union; both actions took place in the context of employer attempts to isolate union supporters from other employees (Tr. 472-473); and both occurred at a time when an active decertification effort was underway. (Tr. 953) Furthermore, shortly after Acen made the statement to Medero Ledesma about where she should live in relation to Union supporters, he made the explicit threat to her that "one by one" he was going to get rid of employees who go out on strike. At or around the same time, Acen solicited Medero Ledesma to tell employees that there would not be a raise unless they no longer belonged to the Union. In light of the foregoing patently threatening and coercive statements, Acen's statement about Medero Ledesma's housing location was coercive of her Section 7 rights in violation of Section 8(a)(1) of the Act, as found by the ALJ.

b. The ALJ Correctly Concluded that Acen's Statements to Medero Ledesma at the End of September Violated Section 8(a)(1) of the Act

The ALJ found that Respondent violated Section 8(a)(1) of the Act when Acen told Medero Ledesma around the end of September that he could not transfer her to another department because he had a list of Union supporters in that department who he was going to get rid of one by one, and, when she persisted in her request for a transfer, asked her if she also wanted to be fired. (J.D. 14)

Both Medero Ledesma and Respondent's supervisor William Sanchez testified that Medero Ledesma was interested in a transfer to the Paws Department around September. (Tr. 406-407, 878) Medero Ledesma's brother had begun working in the Live Hang department, and since his new schedule was different from hers and they drove to work together, Medero Ledesma sought a transfer to Paws, which had a similar schedule. (Tr. 406-407) Sanchez testified he told Medero Ledesma she had to talk to De-bone Manager Bernard Cooper about a transfer. (Tr. 878) However, Medero Ledesma took her transfer request directly to Acen. (Tr. 406) In light of her frequent meetings with Acen and the fact that Medero Ledesma and Cooper do not speak the same language, it is logical that she bypassed Cooper and approached Acen with her request. When she requested that Acen transfer her to Paws, Acen replied that he could not do so at that time because there were Union supporters in that department and he was going to get rid of them one by one. (Tr. 407) Acen also told Medero Ledesma that he had a list of Union supporters in the Paws and Live Hang departments. (Tr. 433, Resp. Ex. 11, p.4) When Medero Ledesma persisted in seeking a transfer to Paws, Acen asked her if she wanted to get fired too, and she said that no, she would just wait. (Tr. 407, Resp. Ex. 11, p.4)

While Respondent argues that Acen's authority at its facility does not include transferring employees, Acen's statements to not only Medero Ledesma but also to Diaz indicate otherwise. In this regard, Diaz testified that Acen told him in November that since there were mostly Union supporters in the Live Hang department, he was going to transfer trainer Jose Otero there so that he could train other employees and thereby avoid the problem of the plant from becoming paralyzed if the Union supporters struck the Respondent again. (Tr. 491) Respondent contends that the foregoing testimony corroborates Acen's denials that he never told anyone that he was going to fire employees in Paws or Live Hang. (R. Brief 38) What is clear from the conversations recounted by Medero Ledesma and Diaz is that Acen was very concerned about the effects a Live Hang walkout

would have on Respondent's production at the plant. Not surprisingly then, between his September conversation with Medero Ledesma and his November conversation with Diaz, he arrived at different ways of dealing with the problem. In this regard, it is also notable that Medero Ledesma's brother (who is also Cuban) got transferred to Live Hang around the end of September. (Resp. Ex. 11, p.4) In light of the above, the record evidence supports the ALJ's determination that Acen told Medero Ledesma that he could not transfer her to Paws because he had a list of Union supporters in that department that he was targeting for discharge.

Respondent further argues that the ALJ incorrectly concluded that Respondent unlawfully created the impression of surveillance when Acen told Medero Ledesma that he had a list of Union supporters in Paws and Live Hang that he was targeting.

The ALJ's determination that Acen's statement violated Section 8(a)(1) of the Act is rightly decided. The test to determine when an employer's statement creates an unlawful impression of surveillance is "whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance." *Flexsteel Industries*, 311 NLRB 257, 257 (1993). The Board has reasoned that the gravamen of the violation is that "employees are led to believe that their union activities have been placed under surveillance *by the employer.*" *North Hills Office Services*, 346 NLRB 1099, 1104 (2006) (emphasis in original). Informing an employee that the employer has a list of union supporters creates the impression that the employer is keeping track of employees' union activities, thereby coercing them in the exercise of their rights under Section 7 of the Act. *See*, *In re Mohawk Indus., Inc.*, 334 NLRB 1170, 1176 (2001). The cases cited by Respondent are distinguishable on their facts in that none concern a supervisor telling employees that the employer is maintaining a list of union supporters targeted for termination.

For the foregoing reasons, the ALJ correctly decided that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 9(G), (H) and (I) of the Amended Complaint.

c. The ALJ Correctly Found that Respondent Violated the Act When Its Manager Bernard Cooper Made Coercive Statements to Union Activist Adolfo Jimenez in September

On September 2, just two days after Adolfo Jimenez and many other employees engaged in a one-day strike, Jimenez went to Respondent's human resources office to speak with Acen. (Tr. 530-531) After Jimenez knocked on Acen's door, De-bone Manager Bernard Cooper came out and asked Jimenez what he was doing there. (Tr. 530-531) When Jimenez told him he had a message for Acen, Cooper informed Jimenez that he could not be in the human resources office on his break and that he had to return to the break room. (Tr. 531-533) Acen then arrived and when Jimenez complained about the incident, Acen said that it was okay to come to his office during breaks but that he did not have time to meet right then. (Tr. 550-551) It is undisputed that employees, including Jimenez, had regularly gone to the human resources office on their breaks prior to September 2. (Tr. 996-997)

A week after Respondent discharged Carrion Rivera and Jimenez had walked out on strike in protest, Jimenez was timing one of the production lines at Respondent's facility when Cooper approached. (Tr. 544-545) Cooper told Jimenez he did not have the right to time the line. (Tr. 545) Jimenez began protesting to Cooper that he did have the right to time the line, and Cooper called upon Supervisor Carlos Valladares to translate. (Tr. 545) Valladares then reiterated to Jimenez that he was not allowed to check the speed and that if there was one more word from Jimenez about it he did not know what was going to happen. (Tr. 545) Cooper flatly denied that this incident ever occurred, however Respondent witness Kimberly Clark testified that she recalled Jimenez complaining to her in mid-September about being prevented from timing the lines, and that it was possibly Cooper who Jimenez had fingered. (Tr. 865-866) Thereafter, in around October, the Union raised the issue of line timing at a bargaining session, and that Jimenez was prevented from timing a line. (Tr. 814)

The ALJ concluded that Respondent violated Section 8(a)(1) of the Act, when, on September 2, Cooper informed Jimenez that he could not visit the human resources office on his breaks, and on September 17, when Cooper told Jimenez he could not time the lines and made an unspecified threat of reprisal if Jimenez persisted in insisting that he had the right to time the lines. (J.D. 29, 34)

Respondent first excepts to the ALJ's determination that the events of September 2 took place at all. Specifically, Respondent claims that the ALJ's sole basis for finding a violation was his reasoning that it was "entirely plausible that at a time of heightened tension in the plant…that Cooper would react in the manner described by Jimenez…" (J.D. 29) However, what Respondent ignores is that in the previous sentence, the ALJ credited Jimenez's testimony, noting that it was "detailed and consistent…on both direct and cross-examination." (J.D. 29) The ALJ also found that Cooper and Acen "appeared to testify on this point in a way designed to support the Respondent's defense." (J.D. 29) Events do not happen in a vacuum. The ALJ rightly supported crediting Jimenez when he took note of the fact that September 2 was Jimenez's first day back at work after he went out on strike (for the fourth time in about two weeks), and that as a result of the strikes, there was heightened tension in the plant.

Respondent makes a further argument with regard to the ALJ's determination that Respondent violated Section 8(a)(1) on September 2. According to Respondent, Cooper's statement could not have coerced Jimenez in the exercise of his Section 7 right. However, as the ALJ rightly found, Cooper's statement limited employee access to the human resources office *in retaliation for union activity that Jimenez and other employees engaged in*. (J.D. 29) (emphasis added) Again, events do not happen in a vacuum. Cooper's prohibition of Jimenez visiting human resources happened on his first day back at work after striking. As noted above, Jimenez had visited human resources on numerous occasions in the past without incident. An employer violates

Section 8(a)(1) of the Act when it retaliates against an employee for having engaged in protected activity by subjecting him to different treatment than other employees. *See*, *Success Village Apartments, Inc.*, 348 NLRB 579 (2006). The ALJ correctly found that Cooper's statement to Jimenez was retaliatory, and that it would tend to coerce him in exercising his Section 7 rights.

With regard to the ALJ's conclusion that Respondent, by Cooper through translator Valladares, made a threat of unspecified reprisal to Jimenez on September 17, Respondent contends that the statement is too vague for a violation to be found. Respondent incorrectly analogizes the statement at issue here with one the Board found too vague in *Baker Concrete Construction, Inc.*, 341 NLRB 598 (2004). (R. Brief 48-49) The Board in that case concluded that a supervisor's statement to an employee that if she did not "stay away from these people…[she] would have trouble" was not an unspecified threat of reprisal because it was unclear *who* would give the employee trouble. 341 NLRB at 598. In this case, Cooper first informed Jimenez he could not time the line. Then, as Jimenez began asserting his right to time the line, Valladares translated and told Jimenez that one more word from him and he did not know what would happen. Given the above circumstances, and unlike in *Baker Concrete*, Jimenez would reasonably understand that if he kept protesting, his employer could take adverse action against him. *See*, *Ardsely Bus Corp., Inc.*, 357 NLRB No. 85, at sl. op. p. 3 (2011). In consideration of all of the foregoing, the ALJ correctly concluded that Cooper's statement was an unlawful threat of unspecified reprisal, as alleged in Amended Complaint paragraph 11(C).

Lastly, Respondent excepts to the ALJ's refusal to find that Respondent repudiated Cooper's September 2 and 17 actions under the test set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The ALJ correctly found that Respondent did not sufficiently satisfy the requirements of *Passavant*. First, there is no evidence that Respondent ever gave the required assurances to employees that it would not interfere with the exercise of their Section 7 rights in the

future as mandated by *Passavant*. Furthermore, in order to remain within the protection that *Passavant* provides to employers who would otherwise be found to have committed an unfair labor practice, the employer cannot engage in any further unlawful conduct after assurances are given. In this case, the ALJ rightly concluded that during the month of September, Respondent fired Carrion Rivera and committed a number of other unfair labor practices. Consequently, any repudiation attempted by Respondent was negated by its contemporaneous unlawful actions. The ALJ's conclusion that Respondent had not complied with the requirements set forth in *Passavant* is well-founded.

VI. THE ALJ CORRECTLY FOUND OMAR CARRION RIVERA ENGAGED IN SECTION 7 ACTIVITY ON THE DAY RESPONDENT SUSPENDED HIM

Union committeeman Omar Carrion Rivera was a trainer on line 5 at Respondent's facility prior to his suspension on September 8 and termination on September 10. On September 8, he was working on line 5 when Supervisor Adolfo Padilla came to his line to take another employee, Noe Vasquez Lozada to line 2. (Tr. 211-216) Manager Cooper and Supervisor Ramon Ayala were also present in the area. (Tr. 213) Carrion Rivera told Padilla that he could not take Vasquez Lozada, as supervisors come to his line and take all the experienced employees leaving him nothing but new, inexperienced employees. (Tr. 214) When Padilla repeated his order to Vasquez Lozada that he go to line 2, Carrion Rivera asked Padilla why he was continuing to threaten Vasquez Lozada. (Tr. 215, 318) In this connection, Carrion Rivera knew about Vasquez Lozada's suspension in August that arose out of an issue with a transfer. (Tr. 164, 318) Manager Cooper then told Padilla "let's go" and the three supervisors left. (Tr. 216) At the time the conversation was happening between Carrion Rivera and Padilla, some nearby employees repeatedly chanted "strike." (Tr. 341, 1151)

At the end of the day on September 8, both Carrion Rivera and Vasquez Lozada were suspended. When Carrion Rivera returned to Respondent's facility he was terminated for "[g]rossly

disrespectful and intimidating conduct towards a supervisor" as set forth in his disciplinary counseling record. (G.C. Ex. 7)

The ALJ found that Carrion Rivera was engaged in Section 7 activity when he discussed Lozada's transfer with Padilla. (J.D. 21) The ALJ rightly reasoned that Carrion Rivera's actions demonstrated that he was acting as Vasquez Lozada's representative in that discussion. (J.D. 21) The ALJ noted in this regard that Carrion Rivera had represented the interests of unit employees in meetings with supervisors on a number of occasions in the past. (J.D. 21, Tr. 158-179) Furthermore, the ALJ found that as a member of the Union's employee committee and the most active Union adherent in the facility, Carrion Rivera's intervention in the matter was actually "union activity." (J.D. 22) The ALJ correctly noted that the Board has held that the action of one employee espousing the cause of a second employee is protected concerted activity. (J.D. 22) Furthermore, the ALJ rightly stated that the substantive merit of an employee's complaint about working conditions is irrelevant to the determination of whether a matter is protected concerted activity. (J.D. 22)

Respondent contends that the ALJ erred in concluding that Carrion Rivera was engaging in Section 7 activity at the time of his discussion with Padilla. Respondent's contention is that Carrion Rivera only objected to Lozada's transfer because it was a personal inconvenience to him, and not because he was advancing Lozada's interest in the matter. (R. Brief 16)

There is no dispute that Carrion Rivera repeatedly brought his concern to Respondent's management about the disproportionate number of inexperienced employees on his line. It is equally undisputed that having that many new employees affected Carrion Rivera personally in his capacity as a trainer on Line 5. But the foregoing does not detract from the concerted nature of Carrion Rivera's protest before Padilla on September 8. Line assignments and staffing of lines are, as the ALJ pointed out, clearly terms and conditions of employment. Lines that were short workers,

or staffed by inexperienced employees, had a tendency to get behind, with the remaining employees having to perform more work. (Tr. 209) One employee's issue with a term or condition of employment can also be an issue for other employees, who may have a different basis for their own complaint. This was clearly demonstrated here when after Carrion Rivera began his discussion about Lozada's transfer with Padilla, employees in the area began chanting "strike." One employee's actions can be endorsed by another spontaneously and in a manner different from the first employee and still be considered "concerted." *See*, *Worldmark by Wyndham*, 356 NLRB No. 104 at sl. op. p. 3 (2011); *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984). As the ALJ properly pointed out, the fact that employees began saying "strike" establishes that they were reflecting support for Carrion Rivera's opposition to Lozada's transfer. (J.D. 22) For the foregoing reasons, the ALJ correctly decided that Carrion Rivera was engaging in Section 7 activity during his conversation with Padilla on September 8.

VII. THE ALJ'S CREDIBILITY DETERMINATIONS REGARDING THE INCIDENT LEADING TO THE SUSPENSION AND TERMINATION OF CARRION RIVERA ARE WELL-FOUNDED AND SUPPORTED BY THE RECORD

The Board should defer to the ALJ's credibility findings with regard to the September 8 discussion between Carrion Rivera and Padilla pursuant to the standards set forth in *Standard Drywall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

The Respondent excepts to the ALJ's crediting of Carrion Rivera, employee Yasha Walesca Rivera Melendez and Vasquez Lozada with regard to conversations on September 8. Respondent asserts that the more credible testimony is that of supervisors Cooper, Padilla and Ayala. First, Respondent asserts that Carrion Rivera's testimony that he did not hear anyone shouting at the time of his conversation with Padilla "seriously impairs" his credibility as all other witnesses testified that employees were shouting. (R. Brief 10) Respondent contends that another reason not to credit Carrion Rivera is that he testified that he and Padilla were two meters apart, the three supervisors

testified that they were within touching distance, and it is not credible that Carrion Rivera and Padilla were that far apart while having a discussion. (R. Brief 10) Respondent next argues that Melendez's credibility is also compromised because (1) she was a friend of Carrion Rivera's and (2) she did not see Supervisor Ayala or Cooper who all the other witnesses testified to being present.

Carrion Rivera's testimony that he did not hear employees shouting during his conversation does not call into question his credibility as to the events of September 8. The shouts of "strike" were occurring during Carrion Rivera's conversation with Padilla. Consequently, the most likely reason Carrion Rivera does not recall employee chants is because he was involved in the discussion with Padilla. Carrion Rivera's own testimony bears this out. When asked on cross-examination if he heard employees saying anything, Carrion Rivera responded, "I didn't see (sic) anything because I am speaking with the supervisor." (Tr. 260) With regard to the distance between Carrion Rivera and Padilla, the ALJ entirely discredited the three supervisors' testimony concerning Carrion Rivera's actions on September 8. Second, Counsel for the Acting General Counsel submits that there is nothing incredible about having a conversation with someone who is "about two meters" away, as Carrion Rivera testified. (Tr. 257)

Respondent's assertion that Rivera Melendez and Carrion Rivera are friends is simply not true. Rivera Melendez testified that she and Carrion Rivera are not friends outside of work. (Tr. 1152) Furthermore, given the location of Line 5 and where the three supervisors were standing, it is likely that Melendez did not see Cooper and Ayala during the conversation because they were standing behind a column. (R. Ex. 6)

The ALJ fully supported his reasons for discrediting Cooper, Ayala and Padilla. The ALJ found their testimony to be overly dramatic and contrived. (J.D. 19) The ALJ also considered their testimony to be unreliable based on other evidence in record. First, the ALJ pointed to the testimony of Medero Ledesma that she was present in Acen's office when he told Padilla that he

had to say that "he feared for his life so that [Carrion Rivera] wouldn't come back to the plant." (Tr. 1057) The ALJ also found that, contrary to his testimony, Ayala attended a Union meeting during which he informed Union Organizer Tim Mullins and the other attendees that "Omar was innocent" and that he "didn't do anything." (Tr. 1155-1156, 1078) The ALJ had a sound basis to conclude that Ayala was a witness unworthy of belief as to the events of September 8 because he gave conflicting testimony about whether he had ever been at the Union's meeting place. (Tr. 741, 1188-1190)

Further record evidence supports the ALJ's conclusion that the three supervisors' testimony was not credible about what happened on September 8. Ayala testified that after Cooper removed Padilla from the scene, he stayed in the area and continued working. (Tr. 686) If events had unfolded in the manner described by the supervisors, it is not credible that Ayala would simply go on about his business and return to work. In addition, Cooper testified that Padilla was shaking after the incident with Carrion Rivera (Tr. 729), and that Padilla continues to be hesitant in approaching employees as a result. (Tr. 729-730) Yet, Padilla seemed to have no problem retrieving Vasquez Lozada that same day and escorting him to the office for his suspension meeting. (Tr. 321-322, R. Ex. 7 and 8) Lastly, the conversation between Carrion Rivera and Padilla happened at around 8:00 a.m. By all accounts, Carrion Rivera was not called to the office until very late in the afternoon. Respondent's witnesses never addressed why it left a person, who had supposedly threatened a supervisor while wielding a knife, to work out the rest of his day on the line.

For all the above reasons, the Board should uphold the ALJ's credibility resolutions related to the events of September 8 pursuant to the *Standard Drywall* standards.

VIII. THE ALJ CORRECTLY APPLIED THE FOUR-FACTOR *ATLANTIC STEEL* ANALYSIS TO THE RESPONDENT'S SUSPENSION AND TERMINATION OF OMAR CARRION RIVERA

The ALJ correctly concluded that the suspension and termination of Carrion Rivera should be analyzed under the Board's decision in *Atlantic Steel Co.*, 245 NLRB 814 (1979). In addition, the ALJ's determination that it was unnecessary to thereafter engage in a *Wright Line* analysis was sound.

The Board has consistently recognized that an employee who is otherwise engaged in Section 7 activity, can lose the protection of the Act by opprobrious conduct. The Board considers four general factors to make this determination:

> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.
> *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

The subject matter of the discussion, *Atlantic Steel* factor number two, weighs in favor of protection. As explained in detail above, the discussion between Carrion Rivera and Padilla concerned terms and conditions of employment. The Board has reasoned that when the underlying discussion concerns employees' terms and conditions of employment, that weighs in favor of the Act's protection. *Datwyler Rubber and Plastics, Inc.*, 350 NLRB 669, 670 (2007).

With regard to the third factor, the nature of the "outburst," the credible testimony outlined above establishes that in talking to Padilla, Carrion Rivera did not do or say anything that was threatening or offensive. Furthermore, Carrion Rivera's actions did not cause a breakdown in employee "discipline," like in many of the cases cited by Respondent. Thus, this case is very different than those where the Board has found that the offensive or disrespectful nature of an employee's outburst caused other employees to act similarly, resulting in a breakdown in workplace decorum, *Marico Enterprises, Inc.*, 283 NLRB 726, 732 (1987), or where an employee's sustained use of expletives when talking about and to management were overheard and commented on by other employees. *Aluminum Co. of America*, 338 NLRB 20, 22 (2002). Carrion Rivera did not raise his voice, use offensive language or engage in any threatening behavior like the employees did

in the foregoing cases. At worst, Carrion Rivera's statements to Padilla could be viewed as challenging Padilla's line assignment determinations. Such a mild "outburst" does not remove an employee, who is otherwise engaged in Section 7 activity, from the protections of the Act.

The discussion between Carrion Rivera and Padilla took place in the work area of the plant, where many employees were present. This fact arguably would weigh against protection. However, in this case, Carrion Rivera did not engage in any of the actions that would cause the problems normally associated with an "outburst" on the plant floor like in *Marico Enterprises*.

While Carrion Rivera's discussion with Padilla admittedly was not directly provoked by an unfair labor practice, it took place within one week of the fourth strike at the plant, which was also the strike in protest of Respondent's suspension of Vasquez Lozada, allegedly for refusing to obey a transfer order from Padilla. In light of the above circumstances, this fourth factor should be neutral in the *Atlantic Steel* balancing test.

In applying the *Atlantic Steel* test to this case, the ALJ correctly found that factor four is neutral, factors two and three weigh in favor of protection and only factor one weighs against Carrion Rivera retaining the protection of the Act. The ALJ reasoned that factor one is outweighed by factors two and three. (J.D. 24-25) Consequently, under *Atlantic Steel*, the ALJ was right to conclude that Respondent violated the Act when it suspended and thereafter terminated Carrion Rivera.

Finally, as the ALJ correctly pointed out, the Board has repeatedly stated that where an employee is discharged for conduct that occurred while otherwise engaged in Section 7 activities, a *Wright Line* analysis is unnecessary. (J.D. 25)

IX. CONCLUSION

Accordingly, Counsel for the Acting General Counsel respectfully submits that Respondent's exceptions are without merit.

Dated at Cleveland, Ohio, this 28th day of October 2011.

Respectfully submitted,

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